

Commission has the authority to issue rules of special concern to the CMRS providers.^{39/}

The appellate court accordingly refused to vacate the Commission's local competition rules, including Rule 51.703, as applied to LEC/CMRS interconnection.

LECs also argued on appeal that the Commission's rule "requiring mutual and reciprocal compensation of paging companies should be set aside":

The FCC's rules requiring LECs to compensate paging companies for traffic that originates on the LEC's network is also contrary to the plain language of the Act.^{40/}

The appellate court determined that this LEC argument was so baseless that it did not even specifically address this argument in its order, and it reaffirmed the validity of Rule 51.703(a) as applied to LEC/CMRS interconnection.

As noted, other LECs, but not the current petitioning LECs, asked the Commission to reconsider its *First Local Competition Order* as applied to LEC/paging interconnection. For example, Kalida Telephone Company asked the Commission to "reverse its decisions [1] to require 'mutual' or 'reciprocal' compensation to paging carriers and [2] that will require LECs to provide terminating facilities to paging providers at no charge."^{41/} Reconsideration of the first, reciprocal compensation issue would now appear to be foreclosed

³⁹ *Iowa Utilities Board*, 120 F.3d at 800 n.21.

⁴⁰ Brief of the Mid-Sized Incumbent LECs filed in Case No. 96-3321 (8th Circuit) at 50-51.

⁴¹ Kalida Telephone Petition for Reconsideration and Clarification, Docket Nos. 96-98 and 95-185, at 1-2 (Sept. 30, 1996). *See also* Petition of the Local Exchange Carrier Coalition for Reconsideration and Clarification, Docket Nos. 96-98 and 95-185, at 17-18 (Sept. 30, 1996).

under the collateral estoppel doctrine. The Commission's reconsideration of the unlawfulness of LEC facilities charges remains pending.

G. The SBC Clarification Letter and the Bureau's Ruling. On April 25, 1997, over seven months after reconsideration petitions were due,^{42/} Southwestern Bell asked for "clarification" that the *First Local Competition Order* "prevents a LEC from recovering facilities charges" from paging carriers.^{43/} Southwestern's claim that the Commission's *Order* and rules were unclear was not credible. As noted above, in the *Order* the Commission expressly stated that an "interconnecting carrier should not be required to pay the providing carrier for one-way facilities . . . which the providing carrier owns and uses to send its own traffic."^{44/} In addition, other LECs such as Bell Atlantic and Sprint had no difficulty interpreting Commission orders and rules because they stopped charging Arch and AirTouch for facilities.^{45/}

Moreover, Kalida Telephone's reconsideration petition expressly asked the Commission "to reverse its decisions . . . that will require LECs to provide terminating facilities to

⁴² See 47 U.S.C. § 405(a) ("A petition for reconsideration *must be filed* within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of.") (emphasis added).

⁴³ SBC Application for Review at 2 (Jan. 29, 1998).

⁴⁴ *First Local Competition Order*, 11 FCC Rcd. at 16028 ¶ 1062.

⁴⁵ See Letter from A. Richard Metzger, Jr., Chief, Common Carrier Bureau, to Keith David, *et al.*, DA 97-2726, at n.3 (Dec. 30, 1997) ("Bureau LEC Facilities Charges Letter").

paging providers at no charge.”^{46/} Indeed, there is evidence that Southwestern’s parent, *SBC*, actually prepared the *Kalida* petition.^{47/}

The Common Carrier Bureau, after seeking additional public comment, on December 30, 1997 confirmed that the *First Local Competition Order* and the Commission’s implementing rules, including Rule 51.703(b) in particular, prohibit the type of facilities charges which Southwestern and other LECs had continued to impose. Specifically, the Bureau found “no basis” for the argument of some LECs that “LECs are permitted to assess charges on CMRS carriers to recover the costs of facilities that are used by LECs to deliver traffic to CMRS carriers.”^{48/}

The three petitioning LECs — Ameritech, SBC, and US WEST — now challenge the Bureau’s confirmation of the Commission’s rules.^{49/} These challenges are grossly untimely and should be dismissed without reaching the merits. The challenges also must fail on the merits because the Bureau’s interpretation is consistent with the Communications Act of 1934, as amended, and the Commission’s rules and policies. Therefore, the challenges must be denied. Arch and AirTouch’s positions are set forth in the Opposition to Applications for Review to which this document is appended.

^{46/} Kalida Telephone Petition for Reconsideration, CC Docket No. 96-98, at 1-2 (Sept. 30, 1996).

^{47/} Opposition of AirTouch Communications, AirTouch Paging, and Arch Communications to Petition for Stay Pending Commission Review, CCB/CPD No. 97-24, at n.7 (Feb. 19, 1997).

^{48/} Bureau LEC Facilities Charges Letter at 2.

^{49/} SBC Application at 1 and 4.